

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

GABRIEL WILSON,  
  
Plaintiff,

v.

PIERCE COUNTY, a municipal  
corporation organized under the laws of  
the State of Washington, PIERCE  
COUNTY JAIL, PIERCE COUNTY JAIL  
CORRECTIONAL OFFICERS JOHN  
DOE (1) and JANE DOE (1), Nurses  
STEVE CARVER RN, KRISTIN  
BERRES, RN,

Defendants.

CASE NO. 16-5455 RJB

ORDER ON SECOND MOTION TO  
DISMISS FIRST AMENDED  
COMPLAINT

This matter comes before the Court on Defendants Pierce County and Pierce County Jail's Second Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6) (Dkt. 14) and Plaintiff's motion for leave to file an amended complaint (Dkt. 15). The Court has considered the pleadings filed in support of and in opposition to the motions and the file herein.

1 In this case, Plaintiff, a former prisoner, alleges that Defendants violated his federal  
2 constitutional rights and were negligent when they housed him with violent rival gang members  
3 who beat him and when they showed deliberate indifference to his a serious medical need  
4 regarding a leg lesion. Dkt. 10.

5 Defendants Pierce County and the Pierce County Jail now move for dismissal of the  
6 claims against them under Fed. R. Civ. P. 12(b)(6), asserting that Plaintiff has failed to state a  
7 claim upon which relief can be granted. Dkt. 14. For the reasons stated below, the motion (Dkt.  
8 14) should be granted, in part, and denied, in part. In his Response, Plaintiff seeks leave to file  
9 an amended complaint if the Court finds he has not sufficiently stated certain of his claims. Dkt.  
10 15. Plaintiff's motion (Dkt. 15) should be granted.

# 11 I. FACTS

12 Plaintiff bases his claims on two events: an attack by rival gang members and the failure  
13 to properly treat a leg lesion. Dkt. 10.

## 14 A. ATTACK BY RIVAL GANG MEMBERS

15 According to the First Amended Complaint, Plaintiff was booked into Pierce County Jail  
16 on or around March 31, 2014. Dkt. 10, at 5. Plaintiff was a member of the Nortenos street gang  
17 and Plaintiff alleges that Pierce County had knowledge of his gang affiliation. *Id.* Plaintiff  
18 asserts that while he was being transported to the jail, a correctional officer made a comment  
19 about "teaching [Plaintiff] a lesson." *Id.*

20 About a week later, on April 6, 2014, Plaintiff was in a cell in 3 North C Unit. *Id.* No  
21 less than 45 minutes after he was placed in the cell, the cell doors opened and three individuals  
22 entered. *Id.* One of these individuals was Naitaalii Jeovan Toleafoa, a documented member of  
23 the Eastside Loco Surenos street gang. *Id.* Plaintiff alleges that Pierce County, Pierce County  
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1 Jail, and John Doe and Jane Doe correctional officers were aware that the Eastside Loco Surenos  
2 street gang was a rival of the Nortenos street gang. *Id.* These three individuals kicked, punched,  
3 and beat Plaintiff. *Id.*, at 6. Plaintiff asserts that no correctional officer came to his aid. *Id.*  
4 Plaintiff sustained multiple injuries, including a nasal bone fracture, facial contusions and  
5 lacerations, and a right rib fracture. *Id.* Plaintiff was not discovered until after he failed to  
6 appear for dinner. *Id.* He was found in his cell in a pool of blood, with blood on the walls. *Id.*

7 The unit was placed in lockdown. *Id.* Mr. Toleafoa was found wondering around outside  
8 his cell. *Id.* When approached, Mr. Toleafoa stated, "I'm all packed up and ready to go!" *Id.*  
9 Mr. Toleafoa was bloody. *Id.* Mr. Toleafoa was charged criminally. *Id.*

10 Despite knowing the substantial risk that rival gang members posed to Plaintiff, he  
11 alleges that Defendants housed them in the same unit and allowed them to roam within the unit  
12 unsupervised. *Id.* Plaintiff alleges that in response to a public records request for "any written  
13 policy and procedure in regards to housing of inmates with known gang affiliation," a Pierce  
14 County corrections deputy responded that "no records were located." *Id.*, at 7.

15 As a result of this incident, Plaintiff makes claims (1) against Defendants Pierce County,  
16 the Pierce County Jail and corrections officers John and Jane Does for negligence, (2) against  
17 Pierce County and the unnamed corrections officers for being "deliberately indifferent" to his  
18 health and welfare in violation of his constitutional rights pursuant to 42 U.S.C. § 1983, and (3)  
19 against Pierce County and Pierce County Jail for failing to have a policy regarding the housing of  
20 rival gang members in the same unit and so demonstrating "deliberate indifference" to his health  
21 and welfare contrary to the constitution. *Id.*

## 22 B. TREATMENT OF LEG LESION

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1 According to the First Amended Complaint, in or around early June of 2014, while he  
2 was still in the Pierce County Jail, Plaintiff developed a lesion on his right leg. Dkt. 10, at 7. On  
3 June 19, 2014, Plaintiff made a healthcare request, which stated, “I have a zit like soar [sic] on  
4 my right leg. It started out itching but now its [sic] grown and its [sic] very red and its [sic]  
5 painful, and it keeps growing.” *Id.* The next day, he was seen by nurse Kristin Berres, who  
6 diagnosed the lesion as an insect bite. *Id.*

7 On June 22, 2014, Plaintiff made a second healthcare request, stating, [t]he so called bug  
8 bite on my [right] leg has gotten worse and [now] is a throbbing pain. I can’t sleep cause [sic]  
9 just the slightest touch send horrible pain, and it hurts to walk.” *Id.*, at 8. The response states  
10 only “Seen by SCarver DNP on 6/20/14.” Plaintiff alleges the response was unsigned and that  
11 he received no treatment. *Id.*

12 On June 23, 2014, Plaintiff sent a third healthcare request form, which provided, “I now  
13 believe I have merca on my [right] leg. It has more than tripled its size since I saw the doctor  
14 and my lower leg is completely swollen. This is the 3<sup>rd</sup> [request] I’ve put in. Can someone  
15 please help me!” *Id.* Plaintiff alleges that he received no response, so he showed the lesion to a  
16 corrections officer. *Id.* That officer arranged for Plaintiff to be seen on June 24, 2014, when  
17 Plaintiff was treated for the lesion. *Id.*

18 In connection with his leg lesion, Plaintiff makes claims against Pierce County, Pierce  
19 County Jail, Steve Carver RN, and Kristin Berres, RN for negligence and, pursuant to 28 U.S.C.  
20 § 1983, for violation of his Eighth Amendment rights against cruel and unusual punishment, for  
21 the failure to properly treat his leg lesion for a number of days.

### 22 C. MOTION TO DISMISS

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1 Defendants now move to dismiss the Amended Complaint, arguing that the Pierce  
2 County Jail is not a legal entity that may be sued under Fed. R. Civ. P. 17 and so, all claims  
3 against it should be dismissed. Dkts. 14 and 16. Defendant Pierce County moves for dismissal of  
4 the Eighth Amendment claim asserted against it based on the gang attack, arguing that Plaintiff  
5 has not properly alleged facts to establish objective and subjective indifference. *Id.* The County  
6 argues further, that even if it did not have a policy in place regarding the housing of rival gang  
7 members, Plaintiff cannot show that lack of policy was the moving force behind the violation.  
8 *Id.* It moves for dismissal of the Eighth Amendment claim for deliberate indifference to a  
9 serious medical need related to treatment for Plaintiff's leg lesion, arguing Plaintiff has failed to  
10 plead a policy, practice or custom or that the County was deliberately indifferent to his  
11 constitutional rights in relation to this claim. *Id.* Pierce County moves for dismissal of the  
12 negligence claim which was premised on the gang attack, by arguing that Plaintiff has not  
13 sufficiently plead that the County had knowledge of either parties' gang affiliation. *Id.* It  
14 argues, accordingly, that Plaintiff has not shown proximate cause as to this negligence claim. *Id.*  
15 Pierce County moves for dismissal of Plaintiff's negligence claim related to the treatment of his  
16 leg lesion, arguing that Plaintiff did not allege sufficient facts to show that they violated the  
17 standard of care (he was mis-diagnosed, for example), or a harm, other than four extra days  
18 pain. *Id.*

19 Plaintiff opposes the motion, arguing that his claim against Defendant Pierce County for  
20 violation of his Eighth Amendment rights based on the gang attack should not be dismissed  
21 because, construing the facts in his favor and giving him reasonable inferences, he has plead  
22 facts which show the County's policy of not having a policy regarding the housing of rival gang  
23 members and allowing them to "roam freely together" was deliberately indifferent to his  
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1 constitutional rights and the moving force behind the violation. Dkt. 15. He asserts that his  
 2 claim for violation of his Eighth Amendment rights regarding the medical care he received on his  
 3 leg lesion should not be dismissed because “the factual allegations are sufficient to show that a  
 4 right to relief is plausible against Steve Carver and Kristin Berres.” *Id.*, at 9. Plaintiff argues  
 5 that his gang attack based negligence claim against the County is sufficiently pled because the  
 6 County had a duty to protect him, breached that duty when an employee of the County made a  
 7 comment about “teaching [Plaintiff] a lesson” and then housing him with known rival gang  
 8 members, and Plaintiff was injured as a result. *Id.* Plaintiff also opposes dismissal of his  
 9 negligence claim based on the failure to timely treat his leg lesion. *Id.*

#### 10 **D. ORGANIZATION OF OPINION**

11 This opinion will first address Defendants’ motion to dismiss all claims against the Pierce  
 12 County Jail. It will then consider Defendants’ motion to dismiss Plaintiff’s Eighth Amendment  
 13 claims asserted against Defendant Pierce County and then the negligence claims asserted against  
 14 Defendant Pierce County.

### 15 **II. DISCUSSION**

#### 16 **A. STANDARD FOR MOTION TO DISMISS**

17 Fed. R. Civ. P. 12(b) motions to dismiss may be based on either the lack of a cognizable  
 18 legal theory or the absence of sufficient facts alleged under a cognizable legal theory. *Balistreri*  
 19 *v. Pacifica Police Department*, 901 F.2d 696, 699 (9<sup>th</sup> Cir. 1990). Material allegations are taken  
 20 as admitted and the complaint is construed in the plaintiff’s favor. *Keniston v. Roberts*, 717 F.2d  
 21 1295 (9<sup>th</sup> Cir. 1983). “While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not  
 22 need detailed factual allegations, a plaintiff’s obligation to provide the grounds of his entitlement  
 23 to relief requires more than labels and conclusions, and a formulaic recitation of the elements of  
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1 a cause of action will not do.” *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1964-65  
 2 (2007)(*internal citations omitted*). “Factual allegations must be enough to raise a right to relief  
 3 above the speculative level, on the assumption that all the allegations in the complaint are true  
 4 (even if doubtful in fact).” *Id.* at 1965. Plaintiffs must allege “enough facts to state a claim to  
 5 relief that is plausible on its face.” *Id.* at 1974.

6 If a claim is based on a proper legal theory but fails to allege sufficient facts, the plaintiff  
 7 should be afforded the opportunity to amend the complaint before dismissal. *Keniston v. Roberts*,  
 8 717 F.2d 1295, 1300 (9th Cir. 1983). If the claim is not based on a proper legal theory, the claim  
 9 should be dismissed. *Id.* “Dismissal without leave to amend is improper unless it is clear, upon  
 10 de novo review, that the complaint could not be saved by any amendment.” *Moss v. U.S. Secret*  
 11 *Service*, 572 F.3d 962, 972 (9th Cir. 2009).

## 12 **B. CLAIMS AGAINST THE PIERCE COUNTY JAIL**

13 Defendants argue that the claims against the Pierce County Jail must be dismissed  
 14 because it is not a legal entity with the capacity to be sued. Dkt. 14. Fed. R. Civ. P. 17(b)(2)  
 15 states that an entity’s capacity to sue or be sued is determined “by the law of the state where the  
 16 court is located.”

17 Defendants’ motion to dismiss the claims asserted against the Pierce County Jail (Dkt.  
 18 14) should be granted. Under RCW 36.01.010, “[t]he several counties in this state shall have  
 19 capacity as bodies corporate, to sue and be sued in the manner prescribed by law . . . .” Pierce  
 20 County, then, is an entity with the capacity to be sued. “In order to determine whether the  
 21 [Pierce] County Jail is a legal entity separate from [Pierce] County, it is necessary to examine the  
 22 enactment providing for the [Pierce] County Jail’s establishment. *Shackelford v. Mason Cty. Jail*,  
 23 C13-5326 BHS, 2013 WL 5786094, at \*3 (W.D. Wash. Oct. 28, 2013) (*citing Foothills Dev. v.*

*Commissioners*, 46 Wash.App. 369, 376, 730 P.2d 1369 (1986); *Roth v. Drainage Improvement Dist. 5*, 64 Wash.2d 586, 588, 392 P.2d 1012 (1964)). Under RCW 70 .48.180, “[c]ounties may acquire, build, operate, and maintain holding, detention, special detention, and correctional facilities . . . at any place designated by the county legislative authority within the territorial limits of the county.” Under these statutes, the Pierce County Jail is a facility operated and maintained by Pierce County. “It is not granted separate legal status with authority to sue or be sued in its own name.” *Shackelford*, at 3; *See also Nolan v. Snohomish County*, 59 Wash.App. 876, 881–83, 802 P.2d 792 (1990) (a county council is not a legal entity separate and apart from the county itself) and *Greene v. Alameda Cty. Jail*, 2008 WL 4225449, at \*2 (N.D. Cal. Sept. 15, 2008) (dismissing jail because a California “jail is not a suable entity”). The Pierce County Jail should be dismissed from this case, and the caption amended to exclude it.

### C. SECTION 1983 CLAIMS AGAINST PIERCE COUNTY

In order to state a claim under 42 U.S.C. § 1983, a complaint must allege that (1) the conduct complained of was committed by a person acting under color of state law, and that (2) the conduct deprived a person of a right, privilege, or immunity secured by the Constitution or laws of the United States. *Parratt v. Taylor*, 451 U.S. 527, 535 (1981), *overruled on other grounds, Daniels v. Williams*, 474 U.S. 327 (1986). Section 1983 is the appropriate avenue to remedy an alleged wrong only if both of these elements are present. *Haygood v. Younger*, 769 F.2d 1350, 1354 (9<sup>th</sup> Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986). To state a civil rights claim, a plaintiff must set forth the specific factual bases upon which he claims each defendant is liable. *Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9<sup>th</sup> Cir. 1980).

#### 1. Claim for Violation of the 8<sup>th</sup> Amendment Based on the Attack



1 “The Eighth Amendment imposes a duty on prison officials to protect inmates from  
 2 violence at the hands of other inmates.” *Cortez v. Skol*, 776 F.3d 1046, 1050 (9th Cir. 2015). A  
 3 county or municipality is responsible for a constitutional violation, however, only when an action  
 4 taken pursuant to a county or municipal policy of some nature caused the violation. *Monell v.*  
 5 *Dep’t of Soc. Servs.*, 436 U.S. 658, 690–91, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). In order to  
 6 successfully plead §1983 liability on the part of the County, Plaintiff must allege: (1) he was  
 7 deprived of a constitutional right; (2) the County had a policy; (3) the policy amounted to a  
 8 deliberate indifference to his constitutional right; and (4) the policy was the moving force behind  
 9 the constitutional violation. *Mabe v. San Bernardino Cty., Dep’t of Pub. Soc. Servs.*, 237 F.3d  
 10 1101, 1110–11 (9th Cir. 2001)(*internal quotations omitted*).

11 Plaintiff alleges that he was deprived of his 8<sup>th</sup> Amendment right to be free from violence  
 12 at the hand of other inmates by Pierce County. Defendants argue that this claim should be  
 13 dismissed because Plaintiff cannot point to a policy that amounted to a deliberate indifference to  
 14 Plaintiff’s constitutional rights or that such a policy caused the constitutional violation. Dkt. 14.

15 *a. Policy?*

16 Official policy includes the decisions of the lawmakers, “the acts of its policymaking  
 17 officials, and practices so persistent and widespread as to practically have the force of law.”  
 18 *Connick v. Thompson*, 131 S. Ct. 1350, 1359 (2011)(*internal quotations and citations omitted*).  
 19 The official policy in question then, may be either “formal or informal.” *City of Saint Louis v.*  
 20 *Praprotnik*, 485 U.S. 112, 131 (1988).

21 A formal policy is “a deliberate choice to follow a course of action is made from among  
 22 various alternatives by the official or officials responsible for establishing final policy with  
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1 respect to the subject matter in question.” *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483  
 2 (1986) (*plurality opinion*).

3 An informal policy exists when a plaintiff “can prove the existence of a widespread  
 4 practice that, although not authorized by an ordinance or an express municipal policy, is so  
 5 permanent and well settled as to constitute a custom or usage with the force of law.”  
 6 *Praprotnick*, at 127. A plaintiff must show a pattern of similar incidents in order for the  
 7 factfinder to conclude that the alleged informal policy was “so permanent and well settled” as to  
 8 carry the force of law. *Id.* Usually, an informal policy cannot be established by a single  
 9 constitutional deprivation. *Christie v. Iopa*, 176 F.3d 1231, 1235 (9th Cir. 1999). There are,  
 10 however, situations in which isolated constitutional violations are sufficient to establish a  
 11 municipal policy. *Id.* A county “can be liable for an isolated constitutional violation when the  
 12 person causing the violation has final policymaking authority.” *Id.* A county also “can be liable  
 13 for an isolated constitutional violation if the final policymaker ratified a subordinate's actions.”  
 14 *Id.*, at 1238.

15 Plaintiff has alleged that Pierce County does not have “any written policy and procedure  
 16 in regards to housing of inmates with known gang affiliation.” A decision not to act may  
 17 constitute a “policy” for purposes of § 1983 liability. *See, e.g., Oviatt v. Pearce*, 954 F.2d 1470,  
 18 1477 (9th Cir.1992) (“[T]he decision not to take any action to alleviate the problem of detecting  
 19 missed arraignments constitutes a policy for purposes of § 1983 municipal liability”).  
 20 Construing Plaintiff’s allegations in his favor, he has assert sufficient facts to conclude that the  
 21 County’s decision not to have a policy is a sufficient “policy” for purposes of § 1983 liability.

22 b. *County’s Deliberate Indifference to Harm Plaintiff Suffered as a*  
 23 *Result of Policy?*  
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1 Defendants argue that Plaintiff cannot satisfy either the subjective or objective  
2 requirements to show that the County was deliberately indifferent to Plaintiff's constitutional  
3 rights. Dkt. 14.

4 To the extent that Defendants' argue Plaintiff's claim should be dismissed because he  
5 cannot show that Pierce County was subjectively deliberately indifferent, the motion should be  
6 denied. After Defendants filed their briefs, the Ninth Circuit, sitting en banc, decided *Castro v.*  
7 *County of Los Angeles*, \_\_\_ F.3d \_\_ 2016 WL 4268955 (9th Cir. August 15, 2016). In *Castro*, a  
8 pre-trial detainee injured by another inmate in a "sobering cell" sued the county and individual  
9 jailers for violation of his Eighth Amendment rights for failing to protect him from another  
10 inmate. The *Castro* court noted that, "[t]he Supreme Court has strongly suggested that the  
11 deliberate indifference standard for municipalities is always an objective inquiry." *Castro v.*  
12 *County of Los Angeles*, \_\_\_ F.3d \_\_ 2016 WL 4268955 (9th Cir. August 15, 2016). The Ninth  
13 Circuit further noted that the Supreme Court "understood that this objective standard necessarily  
14 applied to municipalities for the practical reason that government entities, unlike individuals, do  
15 not themselves have states of mind." *Id.* The Ninth Circuit clarified that that an objective  
16 standard applies to municipal liability, and to the extent that other cases suggest otherwise, they  
17 are now overruled. *Id.* Accordingly, Plaintiff here only need allege that Pierce County was  
18 objectively deliberately indifferent to his constitutional rights. *Id.*

19 Where a §1983 plaintiff demonstrates "that the facts available to [policymakers] put them  
20 on actual or constructive notice that the particular omission is substantially certain to result in the  
21 violation of the constitutional rights of their citizens, the dictates of *Monell* are satisfied." *Id.*

22 Plaintiff alleges sufficient facts to conclude that Pierce County knew of his gang  
23 affiliation and knew that other inmates of a rival gang were being housed with him. He has  
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1 alleged sufficient facts that Pierce County allowed rival gang members to room freely in the unit  
2 and has asserted that they were unsupervised. Construing the facts in Plaintiff's favor, it is not  
3 an unreasonable inference that the County was on actual or constructive notice that allowing the  
4 comingling of these two gangs (or at least not having a policy to address it) was "substantially  
5 certain" to result in the violation of Plaintiff's constitutional rights. Consequently, the failure to  
6 have a policy was arguably the "moving force" behind the violation. Defendants' motion to  
7 dismiss this claim should be denied.

8 2. Eighth's Amendment Claim Based on Treatment of Leg Lesion

9 Again, in order to successfully plead §1983 liability on the part of the County regarding  
10 the provision of medical care, Plaintiff must allege: (1) he was deprived of a constitutional right;  
11 (2) the County had a policy; (3) the policy amounted to a deliberate indifference to his  
12 constitutional right; and (4) the policy was the moving force behind the constitutional violation.  
13 *Mabe*, at 1110–11.

14 The government has an "obligation to provide medical care for those whom it is  
15 punishing by incarceration." *Estelle v. Gamble*, 429 U.S. 97, 103 (1976). "Deliberate  
16 indifference to serious medical needs of prisoners constitutes the unnecessary and wanton  
17 infliction of pain, proscribed by the Eighth Amendment," and can give rise to a claim under §  
18 1983. *Id.* (internal quotations omitted). "In order to prevail on an Eighth Amendment claim for  
19 inadequate medical care, a plaintiff must show deliberate indifference to his serious medical  
20 needs." *Id.*

21 Defendants' motion to dismiss Plaintiff's Eighth Amendment claim against the County  
22 based on his leg lesion (Dkt. 14) should be granted. Plaintiff fails to allege that the County had  
23 any policy or practice regarding the treatment of his leg lesion. All his allegations relate to the  
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individual medical providers, and not the County or a County policy. Even in his Response he asserts that his claim for violation of his Eighth Amendment rights regarding the medical care he received on his leg lesion should not be dismissed because “the factual allegations are sufficient to show that a right to relief is plausible against Steve Carver and Kristin Berres.” Dkt. 15, at 9. The failure to identify a County policy is fatal to his claim. *See Mabe* at 1110–11 (the policy must be the “moving force” behind the violation for municipal liability). In other words, a theory of *respondeat superior* is not sufficient to state a section 1983 claim. *Padway v. Palches*, 665 F.2d 965, 968 (9th Cir. 1982).

Plaintiff seeks leave to amend his Complaint. Dkt. 15. It is not clear that this claim could not be saved by amendment, so “[d]ismissal without leave to amend is improper.” *Moss*, at 972. Accordingly, Plaintiff should be granted leave to file a Second Amended Complaint, if he chooses, regarding this claim against Pierce County on or before September 9, 2016.

#### **D. STATE LAW CLAIMS FOR NEGLIGENCE AGAINST COUNTY**

In Washington, “[a]n actionable claim for negligence includes four essential elements: (1) a duty owed to the complaining party; (2) a breach of that duty; (3) resulting injury; and (4) proximate cause between the breach and the resulting injury.” *Stenger v. State*, 104 Wn.App. 393, 399 (2001)(citing *Pedroza v. Bryant*, 101 Wn.2d 226, 228 (1984)).

##### **1. Negligence Claim Regarding Gang Attack**

Plaintiff has alleged sufficient facts to state a claim for negligence against the County regarding the gang attack. He asserted that the County had a duty to protect him. He alleges that it breached that duty when it housed him with rival gang members who were allowed to roam “unsupervised,” particularly after one of its employees made a comment about “teaching [Plaintiff] a lesson” a few days before the attack. Plaintiff has alleged sufficient facts that he was

1 beaten as a result of the County's failure to have a policy to address the housing of rival gang  
2 members. Defendants' motion to dismiss the negligence claim against the County should be  
3 denied.

4                   2. Negligence Claim Regarding Leg Lesion Treatment

5           Plaintiff has alleged sufficient facts to state a claim against the County for negligence  
6 regarding the treatment of his leg lesion. The County does not dispute that it had a duty to  
7 provide Plaintiff medical treatment or that it is liable under a theory of *respondeat superior* for  
8 their actions. *See also Shea v. City of Spokane*, 17 Wn. App. 236, 242 (1977), *aff'd*, 90 Wn.2d  
9 43, 578 P.2d 42 (1978)(finding the city's liability "includes the negligence of the jail physician  
10 because the duty to keep the prisoner in health is nondelegable"). Plaintiff has alleged sufficient  
11 facts that Pierce County breached its duty to provide him medical treatment. He informed Pierce  
12 County that he needed treatment on June 19 and was seen by a medical professional on June 20.  
13 On June 22 and June 23, he informed the County that he needed to be seen again. He alleges that  
14 he also told a guard that he needed to be examined on June 23, and that the guard helped him get  
15 an appointment on June 24. He has asserted that the County failed to provide him treatment for a  
16 few days, and so maintains that it breached its duty to him for those few days. He has also stated  
17 adequate facts to support the conclusion that he was harmed by Pierce County's failure to treat  
18 him because he had extra days of pain.

19           **E. CONCLUSION**

20           Defendants' motion to dismiss Plaintiff's claims against the Pierce County Jail should be  
21 granted. Pierce County Jail should be dismissed as a defendant, and the caption amended to  
22 exclude it.

Defendants' motion to dismiss Plaintiff's claim against Pierce County for violation of his Eighth Amendment rights based on the gang attack should be denied. Defendants' motion to dismiss the Eighth Amendment claim against Pierce County, based on the treatment of his leg lesion, should be granted. To the extent Plaintiff seeks leave to amend his complaint to attempt to properly plead this claim, his motion should be granted. If he chooses to pursue this claim, Plaintiff should file his second amended complaint on or before September 9, 2016.

Defendants' motion to dismiss Plaintiff's negligence claims against Pierce County should be denied.

### III. ORDER

Therefore, it is hereby **ORDERED** that:

(1) Defendants Pierce County and Pierce County Jail's Second Motion to Dismiss

Pursuant to Fed. R. Civ. P. 12(b)(6) (Dkt. 14) is:

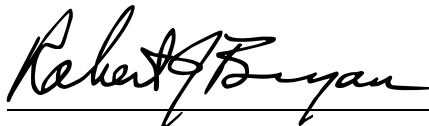
- **GRANTED** as to Plaintiff's claims against the Pierce County Jail; Pierce County Jail is **DISMISSED** as a defendant and the caption is amended to exclude it;
- **DENIED** as to Plaintiff's claim against Pierce County for violation of his Eighth Amendment rights based on the gang attack;
- **GRANTED** as to Plaintiff's Eighth Amendment claim against Pierce County based on the treatment of his leg lesion; and
- **DENIED** as to Plaintiff's negligence claims against Pierce County.

(2) To the extent Plaintiff seeks leave to amend his complaint to attempt to properly plead his Eighth Amendment claim against Pierce County for treatment of his leg lesion, his motion (Dkt. 15) is **GRANTED**. If he chooses to pursue this claim,

1 Plaintiff should file his second amended complaint on or before **September 9,**  
2 **2016.**

3 The Clerk is directed to send uncertified copies of this Order to all counsel of record and  
4 to any party appearing *pro se* at said party's last known address.

5 Dated this 17<sup>th</sup> day of August, 2016.

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8 ROBERT J. BRYAN  
9 United States District Judge  
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